

Written Testimony of

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State of Montana

Before the United States House of Representatives
Committee on Homeland Security

“Havoc in the Heartland: How Secretary Mayorkas’ Failed Leadership Has Impacted the States”

January 10, 2024

Chairman Green, Ranking Member Thompson, Members of the Committee:

As the Attorney General and chief law enforcement officer for the State of Montana, I am grateful for your committee’s attention to how Secretary Alejandro Mayorkas’ failed leadership has impacted states like mine. The crisis at the border is a self-inflicted injury the policies of Secretary Mayorkas have brought upon our nation. The southern border presents a difficult challenge for any administration. But Secretary Mayorkas and the Biden Administration have poured gasoline on the fire. He has violated his oath to defend the homeland and uphold the Constitution by repeatedly disregarding the laws passed by Congress. To that end, he has instructed the men and women of his Department to violate congressional mandates and circumvent court orders issued after states like Montana have taken the drastic measure of filing suit against the federal government to stop the madness at the southern border.

His actions as secretary have turned the border into an effectively meaningless 2,000-mile line in the sand, ceding operational control to Mexican drug cartels—some of the most savage and depraved organizations in world history. In turn, the cartels have seized on Secretary Mayorkas’ weakness, driving addiction and death in our country, expanding their enterprises into human trafficking and smuggling, and engaging in a reign of terror in communities on both sides of the border while the Secretary forces Customs and Border Patrol agents watch in horror.

The southern border and the drugs flowing across it into communities large and small across our nation are ultimately the reason I am the Montana Attorney General today. I am from rural Montana—about as rural as you can get—where I was a private practice attorney until two drug dealers drove by my kids’ school firing guns at each other out their windows in broad daylight.

Not long after that incident, I became our county prosecutor. And there, my eyes truly opened to the devastation that the drug epidemic was hoisting onto our community. I saw what I thought were the worst things possible: babies born addicted to drugs, kids thrown into foster care because their parents would rather buy drugs than take care of them, young girls and women sexually assaulted by family members on drugs, people murdered over \$20 drug deals gone wrong. I had to commit a high school classmate to a psychiatric hospital because drugs had essentially fried his brain.

So, to say that I was encouraged by the previous administration's progress in securing our nation's border is an understatement. It's also an understatement to say that I was horrified to see this administration, under Secretary Mayorkas' leadership, begin to erase that progress and systematically dismantle policies and programs meant to secure the border. Since then, it has been like watching a train wreck in slow motion as our citizens fall victim to violent crime, become addicted to drugs, and, in hundreds of thousands of cases, die because Secretary Mayorkas is derelict in his duty to secure the border.¹

The most devastating impact of the open border on Montana has been the massive quantities of fentanyl and methamphetamine. In 2020, drug task forces in our state seized 6,663 dosage units of fentanyl. In 2021, the first year of Secretary Mayorkas' watch at the border, that quantity exploded ten-fold to 61,000. In 2022, we tripled that, seizing nearly 190,000 dosage units. The numbers aren't finalized for 2023, but as of the third quarter, we were on track to seize nearly one half-million dosage units of fentanyl and yet another 200 pounds of methamphetamine.² This is a staggering amount of drugs for a northern-tier state with just over one million residents—and the cartels trafficked 100 percent of that fentanyl and methamphetamine across the southern border. Once it crosses, it can be in Montana within 24 hours and it has a deadly effect on our communities, especially reservations.

In just one week during March 2022, seventeen people on the Blackfeet Indian Reservation overdosed on fentanyl. Four died.³ I spoke with a woman later that year from the Fort Peck Indian Reservation who was raising her grandkids after both of her sons were killed by fentanyl. In January of last year, a combination of methamphetamine and fentanyl that came across the border from Mexico killed a woman who was seven months pregnant. Nationwide, Indigenous people suffer from the highest rate of fentanyl

¹ National Institute on Drug Abuse. *Drug Overdose Death Rates*. <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates>

² Gibson, Kylie. *Significant spike in fentanyl leads to rising overdose rates in Montana*, KECI (December 31, 2023), <https://nbcmontana.com/news/local/significant-spike-in-fentanyl-leads-to-rising-overdose-rates-in-montana>

³ *Blackfeet tribe declares emergency after drug overdoses*, ASSOCIATED PRESS (March 23, 2022). <https://apnews.com/article/covid-health-opioids-synthetic-opioids-e03fee8a19c143ab5e1c3ae3787e439f>.

overdoses.⁴ In Montana, the opioid overdose death rate among Native Americans is twice as high than it is for white people.⁵

The devastation of Secretary Mayorkas' refusal to faithfully execute the laws goes beyond the deaths it causes and the anguished families left to pick up the pieces. These drugs cause people to do unthinkable things. A suspect in a current drug case was taking delivery of drugs that were being supplied directly from Mexico. She had a minor daughter living in a shed who was sexually assaulted by the man delivering the drugs. In another case last year, a young mother who was homeless was able to find a bedroom in a house, not knowing that the room had been recently occupied by a fentanyl user. Shortly after taking residence, that mother found her 11-month-old child not breathing. Fortunately, medical and law enforcement personnel responded quickly enough to administer naloxone before the fentanyl killed the child.

Nor does the impact of Secretary Mayorkas' policies end with the proliferation of drugs into Montana communities. In a human trafficking operation this summer, our agents arrested three men from Central America. All three were in the country illegally but on deferred action. One had been deported once before and was again apprehended after crossing the border but had been allowed to stay. These men were all here and able to engage in this criminal activity because of the policies Secretary Mayorkas has implemented at the Department of Homeland Security.

While the crisis at the southern border is often the focus of attention, the northern border is also a grave concern to me. The border between Montana and Canada is 545 miles long. Recent reports indicate the fentanyl super labs have been proliferating in that country, including in British Columbia, a province directly adjacent to Montana. In one November bust, authorities there seized approximately 55 pounds of fentanyl and 6.5 pounds of fentanyl diluted for distribution, along with 10 industrial-sized barrels worth of chemical precursors. In all, the seizure represents over 2.5 million street doses of the drug.⁶

This is particularly alarming because under Secretary Mayorkas, DHS has made it a common practice to redeploy Border Patrol personnel from states like Montana to the southern border. As this committee has revealed, thousands of Border Patrol agents and officers were relocated between October 2020 and April 2023, with a substantial increase in Federal Fiscal Year 2023.⁷ I have first-hand knowledge that this includes agents from

⁴ National Center for Injury Prevention and Control. *Opioid Overdose Prevention in Tribal Communities*. CENTERS FOR DISEASE CONTROL AND PREVENTION (August 25, 2023). <https://www.cdc.gov/injury/budget/opioidoverdosepolicy/TribalCommunities.html>

⁵ Bolton, Aaron. *Tribal leaders sound the alarm after fentanyl overdoses spike at Blackfeet Nation* (June 1, 2022) NPR, <https://www.npr.org/sections/health-shots/2022/06/01/1101799174/tribal-leaders-sound-the-alarm-after-fentanyl-overdoses-spike-at-blackfeet-nation>

⁶ *Fentanyl equal to 2.5 million street doses seized at rural property in Mission, B.C.: police*, CBC NEWS (November 2, 2023), <https://www.cbc.ca/news/canada/british-columbia/fentanyl-drug-lab-police-seizure-mission-bc-1.7016534>.

⁷ U.S. House Committee on Homeland Security. *Phase 2 Interim Report: DHS Secretary*

Montana. Adding insult to injury, the redeployed personnel were not there to help secure the border, but to process and more quickly release illegal aliens into the interior of our country. The redeployments forced stations at the northern border cut back on patrols, and curtail participation in joint law enforcement operations, ultimately lessening their effectiveness to disrupt cross-border smuggling.

The specter of Canadian fentanyl super labs with a production capacity that far exceeds demand in their nation and a northern border that could again be left unguarded by the whims of a Homeland Security Secretary who prioritizes political points over safety is terrifying for every law enforcement officer in Montana.

As I said in my opening, the tragedy is that this crisis is entirely self-inflicted. The Trump Administration overcame fierce opposition at every turn and was able to gain control of our southern border as no other previous administration could. But all that progress has been destroyed. Secretary Mayorkas is the architect of that destruction. He took an oath to “well and faithfully discharge the duties” of his office and support and defend our Constitution. By any objective measure, he has failed to keep his oath. At the direction of Secretary Mayorkas, the Department of Homeland Security has wreaked havoc at our southern border, exacerbated the fentanyl epidemic, and emboldened the drug cartels.

I’ve heard some claim that this is merely a resource issue—that if Congress would simply appropriate funds for more border patrol agents or immigration judges, we could solve the border crisis. As a prosecutor, I’m always in favor of giving law enforcement the tools they need to succeed. But the reality is that no amount of funding or resources will change the status quo as long as Secretary Mayorkas is in charge. It’s not negligence and it’s not incompetence. It’s ideology and intransigence.

By willfully and intentionally failing to enforce our nation’s immigration laws, Secretary Mayorkas has violated his oath of office and breached the trust placed in him by the American people.⁸

For the last three years, I have joined Attorneys General across the country in legal challenges to the Biden Administration’s disastrous border policies. Over and over, the Department of Homeland Security has argued in court filings that its refusal to enforce the laws passed by Congress is not subject to judicial review.⁹ Secretary Mayorkas has repeatedly hidden behind the concept of “prosecutorial discretion.” In some instances,

Alejandro Mayorkas has Emboldened Cartels, Criminals, And America’s Enemies (September 7, 2023).

⁸ See generally Hans A. von Spakovsky, Lora Ries, & Steven G. Bradbury, *THE CASE FOR IMPEACHMENT OF ALEJANDRO NICHOLAS MAYORKAS SECRETARY OF HOMELAND SECURITY*, THE HERITAGE FOUND., Feb. 6, 2023, <https://www.heritage.org/immigration/report/the-case-impeachment-alejandro-nicholas-mayorkas-secretary-homeland-security> (discussing the legal case for impeachment of Secretary Mayorkas); see also Lawrence Tribe, *AMERICAN CONSTITUTIONAL LAW 217* (Mineola, NY: Foundation Press, 1978) (noting there’s “wide agreement” that impeachable offenses include “misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption.”).

⁹ See, e.g., *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022).

the courts have halted this illegal behavior and prevented further damage.¹⁰ In others, however, the courts have deferred to the Secretary's discretion.¹¹ Meanwhile, the Biden Administration has gone to court to stop states from defending the border.¹²

As a prosecutor, I can tell you this: There's an obvious difference between exercising discretion and complete abdication. The courts may not be able to hold Secretary Mayorkas accountable for violating his oath of office, but this body *can* and *should*.

Impeachment is a serious and solemn process. It isn't to be taken lightly or used to settle mere policy disagreements. But the Framers understood that impeachment is an appropriate response if members of the executive branch abdicate their duties or statutory responsibilities.¹³

The American people are watching. They know that our border was secure just a few years ago. They see the devastation metastasizing in on our communities from drugs and human trafficking. The conclusion is clear: Secretary Mayorkas has violated his oath of office and the consequences have been dire. I urge this body to impeach.

¹⁰ See, e.g., *Florida v. United States*, Nos. 23-11528, 23-11644, 2023 U.S. App. LEXIS 13863, at *1 (11th Cir. June 5, 2023); *Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB (N.D. Fl. Mar. 8, 2023).

¹¹ See, e.g., *Biden v. Texas*, 142 S. Ct. 2528 (2022); *Arizona v. Biden*, 31 F.4th 469, 472 (6th Cir. 2022).

¹² See, e.g., John Kruzel & Andrew Chung, *White House turns to US Supreme Court in Texas razor-wire border dispute*, REUTERS (Jan. 2, 2024), <https://www.reuters.com/world/us/biden-administration-asks-us-supreme-court-intervene-texas-border-row-2024-01-02/>; Olivia Alafritz, *U.S. seeks court order requiring Texas to remove floating barrier in Rio Grande*, TEXAS TRIBUNE (July 26, 2023), <https://www.texastribune.org/2023/07/26/rio-grande-floating-barrier-injunction/>.

¹³ See, e.g., FEDERALIST 65 (Hamilton); Joseph Story, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 221 (Boston, MA: Hilliard Gray & Co.; Cambridge, MA: Brown, Shattuck and Co., 1833); Jared P. Cole & Todd Garvey, IMPEACHMENT AND THE CONSTITUTION, CONGRESSIONAL RESEARCH SERVICE REPORT No. R46013, at 36, Nov. 20, 2019, <https://crsreports.congress.gov/product/pdf/R/R46013>; Elizabeth B. Bazan & Anna C. Henning, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS No. 98-186, Apr. 8, 2010, at 28, https://digital.library.unt.edu/ark:/67531/metadc29530/m1/1/high_res_d/98-186_2010Apr08.pdf.

Good morning, Chairman Green, Ranking Member Thompson and members of the Committee. Thank you for inviting me to participate in today's hearing on this critical issue.

I am Gentner Drummond, and I was elected as Oklahoma's Attorney General in 2022.

As the chief law enforcement officer of Oklahoma, it is my duty to protect the people of my state. I am here to testify about the dangers my citizens face due to a porous border and the failure of the federal government to enforce the law.

In the early evening of November 20, 2022, law enforcement responded to a quadruple homicide after a Chinese national allegedly entered a garage on a 10-acre marijuana farm in Kingfisher County, about an hour's drive west of Oklahoma City. According to investigators, the man then pulled out a handgun and kept it trained on a group of people – also Chinese nationals – who were inside. He said they owed him \$300,000 that he had invested in the grow operation, and that they had exactly 30 minutes to pay up or he would kill them all.

According to investigators, the assailant killed three men, execution-style, with gunshots to the back of the head, and one woman with two shots to the abdomen. Another man sustained a gunshot wound but survived after being medi-flighted for emergency surgery. It took personnel from six law enforcement agencies to process the gruesome scene.

Much to the credit of law enforcement, police arrested the suspect in Florida two days later.

The carnage of that day is but one tragic example of a failed system plagued by failing leadership. Throughout Oklahoma, law enforcement comes into daily contact with foreign nationals who entered our country illegally or who remain here illegally — or both. This is tragic and common in Oklahoma's illegal marijuana grow operations.

The voters of Oklahoma legalized medical marijuana in 2018. While that legalization led to some legitimate cannabis-related businesses, organized criminals have overtaken the industry.

Our law enforcement partners report that the foreign nationals most often involved in these illegal enterprises come from China and Mexico. We have identified individuals from many other countries, to include Cuba, Bulgaria and Russia.

The one thing these criminals have in common is that they have no regard for our laws or public safety. Criminal illegal immigrants are not content with only growing black-market marijuana. They also produce and distribute fentanyl, and they engage in sex trafficking and labor trafficking.

Oklahoma's law enforcement community fights a constant battle against these evils. The Oklahoma Bureau of Narcotics and Dangerous Drugs, the Oklahoma State Bureau of Investigation, and scores of municipal and county law enforcement agencies deserve much praise for their heroic efforts. Thanks to the leadership of Director Donnie Anderson, the director of the Oklahoma Bureau of Narcotics, his agents and law enforcement partners have seized countless tons of dangerous drugs and arrested untold numbers of traffickers. It should be no surprise to this committee that many of these criminals are foreign nationals who entered this country illegally through our unsecured southern border.

Even the state agency that was created to regulate the legal marijuana market has been forced to combat the explosion of illegal grows. My office has a strong partnership with the Oklahoma Medical Marijuana Authority, led by Director Adria Berry, which provides critical information to our agents and other law enforcement. Thanks to this collaboration, we are able to identify and investigate criminal enterprises that all too often are operated by foreign nationals.

While there have been great successes, the ongoing border crisis ensures a never-ending flood of illegal foreign nationals who continue to perpetrate criminal activities that endanger our people. You may wonder how these foreign nationals have infiltrated the medical marijuana industry in Oklahoma. The pattern is a common one. Foreign operatives conduct a "straw" purchase of rural property just outside city limits. Sometimes they have a front man lease the real estate. Either way, they take steps to conceal their activities. It is common to see that they have pushed up a

berm to prevent visibility from the roads. They often will post armed personnel to stand watch and imply threat.

Members, you can imagine the impact these kinds of actions have in communities throughout rural Oklahoma. Families are scared. They feel unsafe. Smaller law enforcement departments are literally out-manned and out-gunned, and they feel ill-equipped to address the threat.

When I was sworn in as Attorney General, I pledged to the people of Oklahoma that I would do everything in my power to protect them from these dangerous criminals. I petitioned our legislature for greater resources and broader authority to combat this threat. They responded with millions of dollars for equipment and personnel, and they granted my office more power to fight this criminal epidemic being fueled by the border crisis.

In response, I established the Organized Crime Task Force. It is the first of its kind for Oklahoma. And, of course, it is needed because federal officials have failed to enforce the law and secure the border. In the short seven months since its creation, the Organized Crime Task Force has investigated and is prosecuting more than 50 complex, multi-jurisdictional criminal cases. The vast majority of these cases involve Mexican or Chinese drug syndicates.

Because these foreign actors have no vested interest in the well-being of our communities, law enforcement officials have discovered rampant building-code violations that, in turn, have led to fires and explosions. In one case alone, fire at an illegal marijuana grow destroyed more than 10,000 acres and necessitated deploying the National Guard and other agencies across Oklahoma and Texas. In the wake of such incidents, my office demanded strict enforcement of building codes against these illegal foreign operators. As a result, approximately one-half of the marijuana grows in the state were found to be out of compliance. That translates to thousands of unsafe operations across Oklahoma, putting lives and communities at risk.

These foreign actors are creating additional costs that cannot fully be quantified. For instance, the Oklahoma Department of Corrections reports that it currently houses nearly 500 illegal

immigrants convicted of state crimes. At an average cost of \$63.53 per inmate per day, the State of Oklahoma pays roughly \$11 million per year to incarcerate criminal illegals.

Before those criminal aliens were sent to the Department of Corrections, they were in the custody of a local jail, who have their own costs for housing. Likewise, there is a significant cost for law enforcement to investigate these crimes and for prosecutors to prosecute them.

The unsecure border contributes to costs beyond the criminal justice system as well. Oklahoma's water resource authority reports of strain on the utility grid when these operations – which employ no one legally and give nothing back to the community – demand commercial levels of water consumption. We have seen instances where a lone farmhouse is purchased by a foreign entity and a line that once consumed 3,000 to 4,000 gallons a month began consuming tens or hundreds of thousands of gallons monthly. This can equal the consumption of the entire local grid. Other bad actors drill un-permitted wells and draw down from the subterranean water of legitimate farmers, sometimes eliminating the source supply completely. Once these operations have run their course, the criminals simply pull up stakes overnight, leaving behind dilapidated, unsafe structures that are an environmental blight and a threat to public safety.

Additionally, it is widely understood that Oklahoma, like every other state, bears a significant financial burden related to the routine services that must be provided to those who are here illegally. While it is not possible to ascertain the exact amount of that cost to Oklahoma, it is easy to understand the magnitude of that cost. The State bears the burden for the education, health and welfare of a robust and growing illegal population. It is estimated that well over 100,000 live among us, costing Oklahoma taxpayers more than \$750 million each year – with minimal offsetting return. (FYI SOURCE: Federation for American Immigration Reform)

It is important to note that the illegal immigrant population in Oklahoma is vulnerable to exploitation. My office has observed many instances where members of this population become victims of horrific crimes. Every case being investigated by my Organized Crime Task Force – *every* single case – involves some level of undocumented labor trafficking. Law enforcement is seeing this particularly in operations run by Chinese nationals. Officers see tell-tale signs such as abandoned and substandard living conditions for workers and a complete disregard for human

welfare, not to mention countless Occupational Safety and Health Administration (OSHA) violations. We have examples of illegal workers being fed from dog-food bowls, and our agents plan to begin using so-called “cadaver” dogs to find potential unknown victims of these wretched conditions.

During an investigation into illegal drug activities by Chinese nationals, our agents recently coordinated with other law enforcement to serve simultaneous warrants on multiple addresses. At one location, agents found two female Chinese nationals, who spoke no English. Mattresses on the floor of their bedroom were littered with condoms, lotion and other unsavory supplies. The women had been in the country for months, but they could not say where they were and they had not been out of the house since their arrival. They simply awoke every day, worked and went back to sleep. This living horror, which was merely *incidental* to the initial investigation, further illustrates the human cost of allowing persons to remain unsafe and undocumented.

These foreign actors are blatant and cavalier in their efforts. Our investigators are finding job advertisements on international websites targeting and recruiting poor and rural Chinese. These ads, in Mandarin, are thinly veiled offerings to engage in criminal activity. One particularly distasteful ad recruits “girls under 50” for “purely formal bed” and “four days off a month.” Another offers jobs for a “massage spa” to people who are “able to endure hardships” and who have “good hygiene.”

Illegal aliens forced into this clandestine world have nowhere to turn. On the occasions that Oklahoma law enforcement *does* find people at these operations, agents resort to Google Translate attempting to communicate with Mandarin-speaking workers. The agents contact HSI, but invariably they are told that the system is too overloaded for the federal government to assist.

In the end, our officers know it doesn’t really matter whether HSI responds. We confirm that anyone brought in to HSI will simply be released. Without appropriate recourse, officers typically are forced to leave the victimized illegal aliens where they were found.

The upshot is this: If an immigrant claims he or she has entered the country before November 1

of 2020, to be deported they must have incurred at least two DUIs or a DUI plus a more egregious crime. This situation puts the criminal in control. The local field office director of HSI has been disempowered from removing persons without convictions, even if they are repeatedly implicated in criminal reports. Illegal immigrants are also taking advantage of VAWA (Violence Against Women Act) programs or DACA (Deferred Action for Childhood Arrivals) participation.

And it is important to remember that the crimes of these foreign actors range from prostitution to money-laundering to underground casinos. Among the Mexican drug cartels, the Oklahoma Bureau of Narcotics and federal authorities have seen increased activity from cartels such as La Familia, the New Generation Jalisco Cartel and the notorious Sinaloa Cartel.

With the cartels harvesting so much marijuana in Oklahoma, the issue is no longer about smuggled marijuana from Mexico. Rather, the contraband of choice is now fentanyl, a narcotic as addictive as it is deadly. In this regard, the director of the Houston High-Intensity Drug Trafficking Area, Mike McDaniels, reports that we are seeing unprecedented levels of partnership between Chinese nationals and the Mexican cartels operating along the southwest border. Chinese and Mexican nationals work alongside the cartels to produce the opioid in labs in Mexico before transporting it across the border. Director McDaniel indicates the cooperation extends to organized distribution schemes to the U.S. The illicit fentanyl industry is incredibly lucrative. One gram, roughly the weight of a single Sweet & Low packet, can produce 500 pills at an expense of about 10 cents. On the street, each pill sells for between \$10 and \$20.

When Oklahoma law enforcement first interdicted large quantities, we were not seeing an equivalent amount on the street, which led us to believe that the supply was supporting drug habits of insular communities such as foreign-run marijuana grow operations. Tragically, that threat has now invaded our own communities. In 2017, Oklahoma recorded 54 fentanyl overdoses. Only five years later, that number grew to 474. While final figures for this past year are not yet known, we do know there were 317 fentanyl deaths in the first *five* months of 2023 *alone*. The situation has become so dire, in fact, Oklahoma's Department of Mental Health now

operates vending machines for Naloxone, which is used to treat people who are overdosing on an opioid.

The opioid user is not the only one put in harm's way. In August of last year, law enforcement officers in northern Oklahoma responded to a local residence for a welfare check. An officer checking out the premises unknowingly was exposed to fentanyl. He collapsed to the ground, unconscious. The officer's partner was able to administer a triple dose of Naloxone to bring him back from the brink of death.

Mr. Chairman, members of the committee, I believe it is time for accountability. The people of Oklahoma don't deserve to live under constant threat from criminal foreign nationals. The people of Oklahoma don't deserve to have their communities flooded with illegal drugs that were smuggled across our unsecure border. Oklahoma families don't deserve to have their loved ones ripped away by those same drugs.

Members, once the hearing process is concluded, you will have a very weighty decision to make. I trust that each of you has great respect for that solemn duty, and that you will make your decision with great care and deliberation.

As I conclude my testimony here today, I want to ask you to remember the people of Oklahoma as you deliberate. Remember the murder victims, and the drug overdose victims, and the families who mourn them. And of course, please remember the law enforcement officers who risk their lives every day to protect us from it all.

Thank you, Mr. Chairman, Mr. Ranking Member, and members of the Committee.

WRITTEN TESTIMONY - MISSOURI ATTORNEY GENERAL ANDREW BAILEY
HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
Committee on Homeland Security
January 10, 2024

"A nation without borders is not a nation." - President Donald J. Trump

I. Introduction

Chairman Green, Ranking Member Thompson, and distinguished members of the Committee, thank you for the opportunity to appear before you this morning.

Our borders define us geographically, culturally and militarily. Secure borders are the bedrock upon which safe and prosperous societies are built. That ubiquitous truth has been self-evident for millennia, and it remains true today regardless of whether or not the current administration and Secretary Alejandro Mayorkas choose to believe it.

My understanding of border security comes from direct, hands-on experiencing securing a nation's border. It was earned on a barren desert battlefield half a world away from the turret of an M2 Bradley Fighting Vehicle. In 2005, as a newly minted 2nd Lieutenant, my platoon deployed to Nineveh Province, Iraq, under the command of General H.R. McMaster and was tasked with securing the northwest border between Iraq and Syria. Our mission was simple and clear: close the border. And that's exactly what we did. We did not capture people and release them into the interior of the country. We did not hand out citations and ask folks to report back in ten years. And we certainly did not send a "border czar" on fruitless missions to identify the "root causes" of regional migration. No, we closed the border to ensure the country was safe from those who wanted to cross the border to undermine the sovereignty and safety of the nation.

I learned many lessons about leadership and security during my two deployments to Iraq, but chief among them is this: mission success is a function of competent command. Where the leader leads, the troops will go. When the leader has a clear vision, a strong work ethic and a sense of mission integrity, success and security will follow. Conversely, when a leader is indecisive and evasive, chaos will reign – and crisis is inevitable.

Make no mistake, a crisis is exactly what we have. Since 2021, more than eight million illegal immigrants have entered the United States. That is more than the population of Missouri. The illegal immigration rate is so high that in 2023, more illegal immigrants entered our country than there were babies born in the United States. A recent Gallup poll shows that 72% of Americans consider the situation at our southern border a "crisis" or a "major problem." And 82% of Americans say they worry about illegal immigration. Those numbers are alarming, and they have been getting worse nearly every month for the past three years.

These numbers are not an accident; they happened by design. There is only one reason eight million people illegally cross a sovereign nation's border: because they know they can get away with it. And why wouldn't they? In the last three years of Secretary Mayorkas' reign, there has been an orchestrated lack of enforcement of our nation's immigration laws. Our border has become a rudderless ship of chaos.

Secretary Mayorkas, either at the direction of his superiors or of his own volition, has abdicated his responsibilities. He has failed to uphold his oath of office. He has failed to enforce our nation's immigration laws. And he has failed to do that which is most fundamental to his mission: protect our border.

That failure has not only led to today's impeachment proceeding; it has given rise to an unprecedented level of state actions necessary to fill the vacuum created by the Secretary's ineptitude. State attorneys general like me and my colleagues here today have become the vanguard in the fight for border security.

I'd like to highlight for you a few of the actions my office has taken as we fight to secure the border and keep Missourians, and all Americans, safe.

II. Secretary Mayorkas is already in possession of resources needed to secure the border

In an interview last Wednesday on CNN, Secretary Mayorkas stated, "we need additional resources. We need them now and that is why we submitted a supplemental funding package quite some time ago."

In reality, we all know he already has funding. He just refuses to use it.

In FY 2020, Congress appropriated funds explicitly for the purpose of constructing barrier systems at the southern border to keep unauthorized individuals out of our country. In the appropriation, Congress explicitly stated the money "shall only be available for construction of barrier systems along the southwest border," and provided specific criteria on their use and where the barrier systems may be constructed. Secretary Mayorkas and his administration refused to comply with Congress' command.

When asked why the current Administration "did not build a barrier, such as a wall, to keep migrants out," Secretary Mayorkas replied that "[i]t is not the policy of this administration" because "[w]e do not agree with the building of a wall." DHS expressed its intention to "end wall expansion." The Administration even "call[ed] on Congress to cancel remaining border wall funding" because they knew that without congressional action, they would need to use the appropriated funds for their specified purpose: finish the construction of President Trump's border wall. Yet when Congress did not capitulate to his demands, the Secretary ignored his constitutional obligations to abide by Congress's appropriations laws and opted not to use the funding for the purpose Congress directed.

Missouri, alongside Texas, immediately filed suit. DHS attempted to argue we did not have standing to challenge its refusal to use the funds, but the Fifth Circuit Court of Appeals ruled that states can indeed bring a challenge. That ruling cleared the way for our lawsuit against the Secretary's refusal to finish President Trump's border wall to move forward. We anticipate a ruling from the district court any day now.

So while we battle in court over Secretary Mayorkas' refusal to use taxpayer dollars in the manner Congress intended, we have little sympathy for his pleas for more resources. Congress gave him resources. He simply refuses to use them.

III. Secretary Mayorkas is not even attempting to faithfully execute the laws; rather, he is working to loosen them

Rather than find ways to secure our border, Secretary Mayorkas has been busy enacting policies to make it easier to enter our country illegally.

In January, **Missouri filed suit** against Secretary Mayorkas over a new DHS program that unlawfully creates a de facto pathway to citizenship for hundreds of thousands of illegal immigrants. Despite the fact that an executive agency cannot create immigration programs without the express permission of Congress, DHS instituted a new visa system that would allow for up to 360,000 illegal immigrants from Cuba, Haiti, Nicaragua, and Venezuela to be “paroled” into the United States every year. Parole allows noncitizens to physically enter and remain in the United States even though they do not have a legal basis for being admitted. Although Congress authorized a limited parole power for illegal immigrants who meet very specific and stringent standards, Secretary Mayorkas’ program does not meet these standards. Contrary to existing law, the program creates a pathway for program participants to apply from their home country and gain lawful status to enter and stay in the U.S. for up to two years, or even longer, while their application is reviewed. Even worse, Secretary Mayorkas instituted the program without engaging in the notice and comment rulemaking process required by law. This program is another instance of Mayorkas abusing his executive authority to further his dangerous open borders agenda at the expense of the states and their taxpayers.

A mere three months later, **Missouri again filed suit** against Secretary Mayorkas, this time for his attempt to implement a rule that would make it even easier for persons to illegally immigrate into the United States. His new “Circumvention of Lawful Pathways” rule redefined what had previously been considered illegal border crossings as “lawful pathways.” The Circumvention Rule references a new “process” that would allow vast numbers of illegal immigrants to enter the country and receive instant work authorization and quick access under bogus asylum claims. These migrants, who previously would have had to cross the border illegally, will still lack lawful status in the United States (though with a false imprimatur of legality, thanks to the Secretary’s unlawful procedures), and the States will be forced to bear the cost of their presence. Rather than acknowledge the root cause of the influx of illegal immigrants poring over our border, the Secretary tried to define the problem away by simply making something that was once illegal into something legal.

Missouri has not only filed suit against Secretary Mayorkas – we have given him advice on how to fix these problems. In the wake of the October 7 terrorist attacks on Israel, we called on DHS to make regulatory changes that close the catch-and-release loophole that DHS is currently exploiting to implement its mass release policy at the Southwest border. In the Petition for Rulemaking we submitted directly to the Secretary, we asked DHS to end the blatantly unlawful catch-and-release policies because of the horrendous effects on the security of our country. DHS is releasing illegal immigrants at a rate of over one million per year, and that does not include the ones being released on parole under § 1182(d)(5). Even worse, in addition to unlawfully releasing inadmissible immigrants into the U.S., DHS is giving the “parolees” a court date many years in the future. DHS’s unlawful decisions are allowing millions of illegal immigrants to remain in the U.S. for 15 years or longer before ever approaching a judge’s bench.

Secretary Mayorkas does not care.

His refusal to secure the border has resulted in an unprecedented flood of unvetted migrants into the interior of our nation. We have no idea who Mayorkas has allowed into Missouri communities. After what happened in Israel, it is more vital than ever that we secure our border and keep Americans safe.

My office is doing everything in its power to hold Mayorkas accountable and end the border crisis that he created.

IV. The cost to the states

Secretary Mayorkas has enacted illegal policies that are akin to posting a “Come In, We’re Open” sign along the southern border, later refusing to take any responsibility for the consequences of his actions. States are then forced to bear the enormous cost of Secretary Mayorkas’ failure. Despite it not being in the states’ job descriptions to fight cartels, catch illegal immigrants, or subsidize illegal immigrants’ driver’s licenses and educations, state leaders are forced to make an impossible choice: leave the federal government to its reckless policy choices, which inherently leaves our communities to be ravaged, or face the wrath of a federal government who wants us to sit down and shut up.

The choice for me is clear: I will not sit idly by while Missouri communities continue to be decimated by the weight of unchecked illegal immigration under Secretary Mayorkas’ watch.

The Secretary may be pushing his open border agenda in the name of compassion, but the facts tell a different story. It is not compassionate to the women and children being trafficked by cartels at the southern border. It is not compassionate to the Americans losing their loved ones in the streets to fentanyl. And it is not compassionate to Americans who do not know who has been let loose in their communities.

Members of the Committee, here are some key figures:

More than 8 million illegal immigrants have entered America from Mexico since 2021, not including ‘got-aways’. Estimates indicate there have been as many as 1.8 million ‘got-aways’.

Roughly 3 million people were encountered illegally entering the U.S. in fiscal year 2023. On Mayorkas’ watch, we have set the record for the highest number of yearly illegal alien encounters in U.S. history.

December broke a record for monthly encounters with more than 302,000.

A November report by the House Committee on Homeland Security indicates annual federal and state tax dollar support for illegal immigrants exceeds the annual GDP of 15 states. Only a small fraction is ever recouped from the taxes paid by illegal immigrants, according to the report. Medicaid is the biggest expense, at \$12.4 billion dollars in the past 2 years. In FY 2022, taxpayers provided millions of illegal immigrants with nearly 6 billion in food stamps.

Let’s talk about fentanyl. Nearly 12,500 grams fentanyl were seized by the Missouri Highway Patrol in 2023. It takes only 2 milligrams of fentanyl to cause an overdose death. With a population of more than 6 million in the state of Missouri, 12,500 grams of fentanyl could kill Missouri's entire population twice over.

There has also been:

- a 500% surge in child fentanyl exposure deaths,
- a nearly 75% increase in fentanyl overdoses in Missouri between 2019 and 2023, and
- a total of 43 Missouri children died from unintentional fentanyl poisonings in 2022

Let's turn to human trafficking. Missouri ranks fourth on the list of the states with the highest human trafficking rate in the United States, with 4.30 per 100,000 citizens. This makes sense with two interstates flowing through our major cities directly from the southern border. In 2021, the National Human Trafficking Hotline Database recorded 1,100 human trafficking tips in our state. Missouri law enforcement was able to rescue 327 victims from those tips. Most cases revolved around sex trafficking, with the NHTH recording 210 sex trafficking cases, and 15 labor trafficking-related.

And yet while these statistics shed light on a nauseating reality, some of the costs to Missourians cannot be quantified. The loved ones lost to fentanyl or human trafficking can never be replaced, much less properly described in this hearing today.

And yet, Secretary Mayorkas' failure does not discriminate. Red states are not the only ones facing this problem. Blue states are also begging the federal government to course correct, as they too are forced to bear the unspeakable burden of tens of thousands of unauthorized migrants entering their communities.

Only weeks ago, Arizona Governor Katie Hobbs deployed the National Guard to the border to protect her state against the influx of unauthorized migrants flooding into their cities. Prior to that, Illinois Governor J.B. Pritzker sent a letter to DHS begging for federal aid to assist in managing the massive cost from illegal immigrants residing in his state. Before that, New York governor Kathy Hochul declared a state of emergency to handle what she dubbed a "crisis."

V. Congress must bring accountability

The fact of the matter is that every state is a border state. Every state and its citizens are forced to bear the brunt of Secretary Mayorkas' ineptitude. My call to Congress today is simple: remove that burden from the shoulders of everyday Americans and put it back where it belongs - on the shoulders of those sworn to protect us.

The states should not need to take steps to do the federal government's job for them. Secretary Mayorkas swore an oath to faithfully execute the laws of our land, including those intended to protect Americans. Congress has even given DHS ample tools to do its job. But let's be clear: this hearing today is not about resources. It's about Secretary Mayorkas' refusal to use the resources given to him in good faith.

That is important. So often, we are told that Congress has the power of the purse and can use it to check failures by the Executive Branch. But the power of the purse means little if executive officials are going to ignore the appropriations laws this body creates.

In Missouri, we remove officials who do not do their jobs because we have seen firsthand the catastrophic toll it takes on entire communities. It is rightful for Congress to consider removing a government official who refuses to do his job.

We have reached a point of "no-return." The attorneys general sitting before you today are doing everything we can at the state level to rectify this appalling situation, but Congress has a role to play for

accountability. While we battle in the nation's courts, Congress must use every tool at its disposal to obtain accountability for the American people.

I welcome the Committee's questions.

Committee on Homeland Security
U.S. House of Representatives

Hearing: Wednesday, January 10, 2024

Statement of Frank O. Bowman, III
University of Missouri Curators' Distinguished Professor Emeritus
Floyd R. Gibson Missouri Endowed Professor Emeritus

Academic titles provided for identification purposes only. The opinions expressed herein are those of the author, do not reflect those of any other person or entity, and are not endorsed by the University of Missouri.

Introduction

I am honored to have the privilege of addressing the members the House Homeland Security Committee in this first of what I understand to be a series of hearings inquiring into whether constitutional grounds exist to impeach Alejandro Mayorkas, Secretary of the Department of Homeland Security. Although the Committee's previously issued reports, the title of this hearing, and the identity of my distinguished fellow witnesses suggest that much of its focus will be on the performance of Secretary Mayorkas, his department, and the Biden Administration generally in relation to immigration policy and enforcement and other issues concerning control of the United States' southern border, I am not an expert on those topics. I will not comment on them here.

I have, however, been studying and writing about the constitutional standards for impeachment for over twenty-five years. I submitted testimony to the House Judiciary Committee on the meaning of "high Crimes and Misdemeanors" during the Clinton matter¹ and since then have written fairly copiously on a wide range of topics relating to impeachment. In addition to articles in the scholarly and popular press,² I published in 2019 a book on the subject with Cambridge University Press, the second edition of which appeared in November of last year.³

I want to emphasize that, although I have opinions about whether the evidence I have so far seen regarding Secretary Mayorkas meets the constitutional standard for impeachment of a civil officer of the United States, I am not appearing as a witness for or against any person or party. Rather, I am appearing to offer the Committee such advice as I can based on a quarter-century of study of impeachment under the American constitution.

¹ *Background and History of Impeachment*, Hearing before the Subcommittee on the Constitution, House Judiciary Committee, 105th Cong., 2d Sess., Nov. 9, 1998, at 342-372.

² See, e.g., Bowman, *British Impeachments (1376–1787) and the Present American Constitutional Crisis*, 46 HASTINGS CONSTITUTIONAL LAW QTRLY 745 (2019); Bowman, *High Crimes & Misdemeanors -- The Constitutional Limits on Presidential Impeachment*, 72 SOUTHERN CALIFORNIA L. REV. 1517 (Sept. 1999) (with Stephen L. Sepinuck).

³ BOWMAN, *HIGH CRIMES & MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP*, Second Edition (Cambridge University Press 2023) (hereinafter BOWMAN, *HIGH CRIMES & MISDEMEANORS*).

Constitutional Standards for Impeachment

Article II, Section 4 of the Constitution provides that, “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁴ A cabinet secretary is a “civil officer” subject to impeachment. But a cabinet secretary, like the President, Vice President, or any other civil officer, is not impeachable unless he or she is proven to have committed “Treason, Bribery, or other high Crimes and Misdemeanors.”

We are here today to discuss Secretary of Homeland Security Mayorkas and there is no suggestion that he has committed either treason or bribery. Hence, any article of impeachment against him must establish that he committed “high Crimes and Misdemeanors.”

“High Crimes & Misdemeanors” and Policy Disputes

At the constitutional convention in 1787, once the delegates decided that presidents and others should be impeachable, they proposed various definitions of impeachable conduct. In the last exchange, George Mason first suggested “treason, bribery or maladministration.” James Madison recoiled at “maladministration,” saying, “So vague a term will be equivalent to tenure during the pleasure of the Senate.” Whereupon Mason withdrew “maladministration” and proposed instead “other high Crimes and Misdemeanors.” This suggestion was adopted with no dissent or further discussion.⁵

The key point about the exchange between Mason and Madison is that, although Madison was a consistent supporter of a strong impeachment power as a check on presidential authority, he rejected any formula that would subordinate the President to Congress. Mason had made the same point earlier in the convention when he coupled his endorsement of impeachment with the admonition that the president should not, by virtue of impeachment, become “the mere creature of the Legislature.”⁶

Both Mason and Madison wanted to avoid creating an impeachment mechanism that was the equivalent of the “vote of no confidence” common in modern parliamentary systems, a vote that could remove the president or other executive branch officials between elections whenever the legislature disapproves of the official’s behavior or the administration’s policy choices.⁷ As the great Professor Charles Black put the matter in his seminal Nixon-era survey of impeachment:

⁴ U.S. Const., art II, sec. 4.

⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550-52 (Max Farrand, ed. 1911).

⁶ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 86 (Max Farrand, ed. 1911).

⁷ BOWMAN, HIGH CRIMES & MISDEMEANORS, supra note 3, at 92. See also, CHARLES L. BLACK, JR. AND PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK 28 (2d ed. 2018); Keith Whittington, *Impeachment in a System of Checks and Balances*, 87 MO. L. REV. 844 (2022) (the adoption of “high crimes and misdemeanors” by the convention “seemed to capture the range of potential dangers that concerned Madison and others, without leaving the president vulnerable to impeachment over routine political and policy disagreements”).

Madison's reason for objecting to "maladministration" as a ground was that the inclusion of this phrase would result in the president's holding his office "during pleasure of the Senate." In other words, if mere inefficient administration, or *administration that did not accord with Congress's view of good policy*, were enough for impeachment and removal, without any flavor of criminality or distinct wrongdoing, impeachment and removal would take on the character of a British parliamentary vote of "no confidence." The September 8 colloquy [between Mason and Madison] makes it very plain that this was not wanted, and certainly the phrase "high Crimes and Misdemeanors," whatever its vagueness at the edges, *seems absolutely to forbid the removal of a president on the grounds that Congress does not on the whole think his administration of public affairs is good.* *** [W]hatever may be the grounds for impeachment and removal, *dislike of a president's policy is definitely not one of them, and ought to play no part in the decision on impeachment.* There is every reason to think that most congressmen and senators are aware of this."⁸

Since at least 1805, there has been consensus among students of impeachment that it should not be attempted based on simple policy disagreements between Congress and the executive branch,⁹ and that impeachment must not be employed to subordinate the executive to Congress.¹⁰ In recent years, that consensus has become, if anything, more settled. For example, Chief Justice William Rehnquist wrote in his 1992 history of the impeachments of Justice Samuel Chase and President Andrew Johnson that Johnson's acquittal was beneficial insofar that conviction might have made impeachment merely a means to "frustrate the president in his effort to carry out his program."¹¹ In 1999, preeminent impeachment scholar Michael Gerhardt reviewed all the Senate impeachment decisions to that point and observed that the Senate has "concluded that impeachable offenses do not include errors of judgment or policy differences."¹²

Moreover, the principle that the limitation of impeachment to "high Crimes and Misdemeanors" was intended to preclude Congress from seeking to control executive policy through removal or its threat extends beyond the president to his principal cabinet officers. As Raoul Berger, the other great impeachment scholar of the 1970s, concluded:

⁸ CHARLES L. BLACK, JR. AND PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* (2d ed. 2018) (emphasis added).

⁹ The principle that impeachment should not be a weapon of partisan political warfare was established in the 1805 case of Justice Samuel Chase. Chase, an ardent Federalist, did and said a number of probably intemperate things on the bench, but was impeached primarily because President Jefferson and the Republican-controlled House of Representatives disliked his politics and wanted to remove him and replace him with one of their own. The Senate acquitted Chase, a result said to establish that impeachment should not be employed as a partisan weapon, particularly against the judiciary. BOWMAN, *HIGH CRIMES & MISDEMEANORS*, *supra* note 3, at 123-31.

¹⁰ *Constitutional Grounds for Presidential Impeachment*, Report by the Staff of the Impeachment Inquiry, Comm on the Judiciary, U.S. House of Representatives, 93d Cong, 2d Sess. 16, 26 (Feb. 1974).

¹¹ WILLIAM H REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 270 (1992).

¹² Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921 (1999).

In setting up an independent President who was to serve for a term, and in making cabinet officers a part of the executive branch, the Framers surely were aware that a mere vote of no confidence could not, as in England, topple a Secretary. *** It was because the separation of powers left no room for removal by a vote of no confidence that impeachment was adopted as a safety valve, a security against an oppressive or corrupt President and his sheltered ministers.¹³

During the first impeachment of President Donald Trump, his defenders vehemently endorsed the ancient principle that impeachment ought not be based on ordinary policy disagreements between a presidential administration and Congress. As John Malcom of the Heritage Foundation wrote:

The impeachment process is not intended to serve as a partisan political weapon. It is to apply to those who are unfit for office, not those who are merely incompetent or disagreeable. Its purpose is to address serious misconduct, not to settle policy disputes.¹⁴

The President's defenders got the principle exactly right. Indeed, that principle rests not merely on the text of the Constitution, the original understanding of that document's text, and lengthy American precedent, but on important considerations relating to the proper and efficacious conduct of public business in our tripartite national government.

The Framers adopted impeachment because they recognized that some mechanism other than elections might be needed to remove officials in extraordinary cases of egregious misconduct amounting to, in George Mason's phrase, "great and dangerous offenses." But because they wanted none of the three co-equal branches to exercise undue influence over the other, they were, as noted, equally determined to avoid making impeachment a means by which Congress could subordinate the presidency to its will. Impeachment, conviction, and removal of the *President* over policy disagreements, however heated, would produce just such subordination.

Impeachment of a subordinate executive branch official over policy differences is even less desirable. The purpose of impeachment is to remove an official whose continuance in office would pose an ongoing risk of really serious harm to the governmental body in which he or she serves, to the nation's vital interests, or to the constitutional order itself. Implicit in that purpose is the limitation that impeachment should not be considered if removal of the particular officer would effect no material change. For example, removal of a corrupt judge stops further corrupt

¹³ RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 98 (1973).

¹⁴ John Malcolm, *Impeaching Donald Trump: A Game of Political High Stakes Poker*, The Heritage Foundation (Oct. 8, 2019), <https://www.heritage.org/political-process/commentary/impeaching-donald-trump-game-political-high-stakes-poker>. See also, Andrew C McCarthy, *Trump vs. the 'Policy Community': We resolve policy disputes by elections, not impeachments*, NATIONAL REVIEW (November 12, 2019), <https://www.nationalreview.com/2019/11/trump-vs-the-policy-community/>; Jordan Sekulow, *Impeachment 101: Policy Disagreements & "Whistleblowers,"* ACLJ (November 26, 2019), <https://aclj.org/public-policy/impeachment-101-policy-disagreements-whistleblowers> ("Policy disagreements are not a case for impeachment.").

acts by that judge, and removal of a law-breaking autocratic president can prevent incipient tyranny. By contrast, removing a cabinet secretary *because one disapproves of the policy he is pursuing at the behest of his constitutional superior, the President*, changes nothing (other than the personal fortunes of the secretary) because the President remains in office and in charge of policy.¹⁵

Put simply, on one hand, even if successfully impeaching and removing a cabinet officer could change the policy of a presidential administration, using impeachment for that purpose would be contrary to America's constitutional design. On the other hand, given that removing a cabinet secretary is profoundly unlikely to change policy, such an impeachment would almost certainly be futile.

Adding to the essential futility of a policy-based impeachment, the Framers made successful impeachment very difficult. Not only did they adopt language that, properly construed, limits impeachable offenses to extreme cases and great offenses, but they required a two-thirds majority for conviction in the Senate. If there is no serious prospect that the Senate will convict an official whose impeachment is in contemplation, the House ought to have the most compelling justification for embarking on an impeachment inquiry. Otherwise, the scarce legislative resources of the House will be expended on an inevitably contentious battle that cannot produce any practical result and will serve no public end.

Other Grounds for Impeachment?

It may be that Secretary Mayorkas's critics will disavow any intention of impeaching him because they disagree with the policies of the Biden Administration. But if so, on what proper *constitutional* ground might the Secretary's impeachment be based?

"High Crimes and Misdemeanors" is a specialized constitutional term of art that does not mean what it seems to mean. During President Trump's first impeachment proceeding, his defenders insisted that crime or perhaps "crime-like" conduct was necessary, or at the least that there must be a violation of "established law."¹⁶ As a constitutional matter, they were incorrect. No indictable criminal offense is necessary.¹⁷ Nor indeed must there be a statutory violation or transgression of a specific judge-made rule.¹⁸

¹⁵ Moreover, when, as is now the case, the Senate is controlled by the President's party, there is no practical obstacle to replacement of the impeached official with a successor equally committed to the President's policy priorities and approaches.

¹⁶ Trial Memorandum of Pres. Donald J. Trump 81-84 (Jan. 20, 2020), Proceedings of the U.S. Senate in Impeachment Trial of Donald John Trump, Part. III.

¹⁷ Frank O. Bowman, III, *Constitutional Crabgrass: President Trump's Defenders Distort the Impeachment Clause*, Just Security (Jan. 24, 2020), <https://www.justsecurity.org/68240/constitutional-crabgrass-president-trump-defenders-distort-the-impeachment-clauses-frank-bowman-high-crimes-misdemeanors/>.

¹⁸ As Justice Joseph Story observed in Section 797 of his 1833 treatise *Commentaries on the Constitution*, "no previous statute is necessary to authorize an impeachment for any official misconduct." *See also*, BOWMAN, HIGH CRIMES & MISDEMEANORS, *supra* note 3, at 352-53.

However, President Trump’s defenders were right at least in emphasizing that impeachable “high Crimes and Misdemeanors” must be matters of grave public importance and involve misconduct of a magnitude akin to the commission of a very serious crime.

Many commentators have concluded that impeachable offenses ought to be of the magnitude of a serious criminal offense by applying the interpretive maxim *ejusdem generis* to the whole phrase “Treason, Bribery, or other High Crimes and Misdemeanors.” The fancy Latin means no more than that later words in a series should be read in relation to the early ones. In this case, impeachable “other high crimes and misdemeanors” should be similar in type and severity to treason and bribery. As Charles Black wrote:

The catch in applying this *ejusdem generis* rule is the difficulty (sometimes) of correctly pinning down the “kind” to which the specific items belong. In the present case, however, the “kind” to which “treason” and “bribery” belong is rather readily identifiable. They are offenses (1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books.¹⁹

President Trump’s defenders were also correct in observing that previous impeachments, particularly of presidents, have tended to involve conduct that at least might be charged as a serious crime. The reason for that historical trend is plain enough. As Black put it, “The fact that [an allegedly impeachable] act is also criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded.”²⁰ In short, a provable violation of law is useful in demonstrating the seriousness of alleged misconduct.

In sum, the foundational requirement for impeachable “high Crimes and Misdemeanors” is that they must be of extraordinary seriousness and ought to be of a type that corrupts or subverts governmental processes or the constitutional order. In the United States, the types of behavior most commonly found to meet this basic requirement have been official corruption; abuse of power; betrayal of the nation’s foreign policy interests; and subversion of the Constitution.

There is no contention of which I am aware that Secretary Mayorkas has engaged in official corruption of any kind, betrayed the nation’s foreign policy interests, or subverted the constitutional order. I can imagine that those who disagree with the Secretary’s actions as head of the Department of Homeland Security implementing the policy priorities of President Biden, or with his exercise of the discretionary authority of his office in aid of implementing those priorities, might mischaracterize the Secretary’s official conduct as an “abuse of power.” However, long precedent establishes that impeachable abuse of power involves employing the powers of one’s office for illegal or illegitimate ends – particularly to gain personal political or financial advantage, to benefit one’s political allies, friends, or relations, or to injure one’s personal or political enemies – and especially when the abusive exercise of official power

¹⁹ BLACK AND BOBBITT, *supra* note 7, at 34.

²⁰ BLACK AND BOBBITT, *supra* note 7, at 38.

threatens to undermine constitutional values such as electoral democracy, or in the present case, the separation of powers.²¹ Following the policy directives of one's elected superior in pursuit of that superior's policy aims is simply not an impeachable abuse of power.

Impeachment for personal incapacity: It also has been argued, although there is less consensus on the point, that "high Crimes and Misdemeanors" can reach extraordinary instances of professional incapacity expressed in failures to perform one's official responsibilities through extreme incompetence, neglect of duty, or official malpractice. In principle, this must be so at least in extreme cases. As Charles Black famously observed fifty years ago, if the president were to move to Saudi Arabia so he could have four wives and proposed to perform his duties henceforth exclusively by phone and wireless communication, that would necessarily be impeachable (not because of the four wives, perhaps, but because he could not properly fulfill many of his constitutional responsibilities).

Despite the theoretical availability of impeachment based on allegations of extreme professional incapacity, the foundational requirement of extraordinary seriousness and corruption or subversion of governmental processes or the constitutional order remains. In part for that reason and in part because other and easier remedies exist, actual instances of impeachment in the United States for personal incapacity or extraordinarily bad professional performance are vanishingly rare.

The only two cases that arguably fit this category are those of U.S. District Judges John Pickering of New Hampshire (1803) and Mark H. Delahay of Kansas (1873). Pickering was impeached, convicted, and removed essentially for being both alcoholic and insane. Delahay was impeached primarily because his "personal habits" – being habitually drunk on the bench – made him unfit for office, and he resigned before formal impeachment proceedings against him could be concluded.²²

No executive branch official has ever been impeached for personal incapacity. The only cabinet officer ever impeached was William Belknap, President Ulysses Grant's Secretary of War, charged in 1876 with corruptly selling the post of trader at Fort Sill, Oklahoma Territory. Belknap's singular case illustrates two important points.

First, he was impeached for ordinary tawdry corruption. No cabinet officer has ever been impeached for incapacity or radically poor official performance. The obvious reason is that any cabinet officer whose performance is really so egregiously deficient as to border on the impeachable will simply be dismissed by the President. Indeed, that is exactly what happened to Belknap. As soon as the allegations surfaced, President Grant fired the Secretary. But the House, at that point controlled by Democrats for the first time since the Civil War, decided to impeach Belknap anyway to cause political trouble for Grant and his Republican Party.²³

²¹ See generally, BOWMAN, HIGH CRIMES & MISDEMEANORS, *supra* note 3, at 38, 105-07, 192-94, 331-32, 342-46, 353-54, 405-08.

²² *Id.* at 132-135.

²³ *Id.* at 118-19.

Second, the very singularity of the Belknap case is revealing. Only once has the House employed impeachment against a cabinet officer for the transparent purpose of gaining partisan political advantage. And in that case, the officer really had committed impeachable corruption. The House has *never* impeached a cabinet officer because it thought the officer was personally incapable or was doing a terrible job. Nor has it ever sought to categorize a cabinet officer's faithful pursuit of presidential policy as an impeachable dereliction. To paraphrase Charles Black's observation quoted above, until today, "There [has been] every reason to think that most congressmen and senators are aware" that "whatever may be the grounds for impeachment and removal, dislike of a president's policy is definitely not one of them."

In the case of Secretary Mayorkas, I am unaware of any information that would support an argument that he is personally incapable of performing his office. All public information of which I am aware concerning his background, education, training, prior service, and record in his current office²⁴ suggests that he is an experienced, diligent, competent administrator carrying out to the best of his ability directives of his elected superior. That one congressional party disapproves, even disapproves vigorously, of President Biden's policies on immigration or other matters within the Secretary's purview does not make the Secretary impeachable, at least if constitutional language, the original understanding of the founding generation, 230 years of precedent, and considerations of good government and the proper relations between the coordinate branches have any meaning.

Alleged Violations of Immigration Law as Grounds for Impeachment

Perhaps in recognition of the constitutional principles articulated above, the Committee majority seems to be attempting to cast its concerns about Secretary Mayorkas as allegations of violations of law. Most of the supposed legal violations involve debates over the extent and proper exercise of the Secretary's discretionary authority in the immigration field. Although there is pending litigation over some of the Secretary's actions,²⁵ there has been, so far as I am aware, no final resolution of any of this litigation materially adverse to the positions taken by the Department of Homeland Security. The Department has both lost and won some cases in lower courts, and has in some cases succeeded in having lower court losses reversed on appeal. Critically, in the two cases that have reached the U.S. Supreme Court, the justices sided with the Department.²⁶

²⁴ Alejandro Mayorkas, Dept. of Homeland Security, <https://www.dhs.gov/person/alejandro-mayorkas>.

²⁵ Revealingly, the Department has been sued both by immigrant advocates who think its immigration rules and policies are too restrictive and by those, primarily Republican state attorneys general, who think the opposite.

²⁶ *Biden v. Texas*, 597 U.S. 785 (2022) (reversing lower court decision and finding that immigration detention is not mandatory under §1225(b)(2)(A) because §1182(d)(5)(A) grants parole authority and that an administration is not obliged to adopt a return to Mexico policy if the government lacks the capacity to detain all would-be migrants); *United States v. Texas*, 599 U.S. 670 (June 23, 2023) (reversing lower court decision voiding DHS guidelines for immigration enforcement and removal priorities, holding that plaintiffs did not have standing to challenge these guidelines, and emphasizing that the Secretary had long-recognized discretion over arrest and prosecution decisions as set forth in the guidelines).

As a constitutional matter, the existence of active litigation challenging discretionary actions by a cabinet secretary (or indeed by a president) is no ground for impeachment. This may be even more true where, as in the present case, much of the litigation has been brought by state attorneys general of the opposite party to the President and his administration. This is particularly true when, at least to date, the positions taken by those attorneys general have not been accepted by the U.S. Supreme Court.

Even if the Supreme Court were to rule against the administration on significant questions, that is not a proper ground for impeachment.²⁷ Legal disputes over the exercises of executive authority are a commonplace in every administration. And every president wins some and loses others. If the mere existence of such disputes were impeachable, every president and every cabinet officer would be impeachable many times over.

There is, at least at present, no constitutional case for impeaching Secretary Mayorkas

I recognize that today's hearing is only the first in a proposed series directed at determining whether grounds exist for impeaching Secretary Mayorkas. However, all the arguments for impeaching Secretary Mayorkas of which I am currently aware boil down to expressions of disapproval of the Biden Administration's alterations of Trump-era immigration policies coupled with claims that these alterations have produced various allegedly harmful consequences. If one believes that both legal and illegal immigration are bad for the country and ought to be dramatically constrained, then one can fairly oppose Biden's policy choices. If members of Congress oppose this Administration's policy choices, they have ample tools to express that opposition through legislation. But, at least if Congress seeks to remain true to established constitutional law and precedent, that opposition cannot be transmuted into a case for impeaching Secretary Mayorkas.

²⁷ CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE 124-25 (2017).